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Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-6 (Sub-No. 379X)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN GARFIELD AND LOGAN COUNTIES**

**MOTION OF
OKLAHOMA DEPARTMENT OF TRANSPORTATION
TO SUPPLEMENT RECORD**

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Attorneys for Oklahoma
Department of Transportation

Dated: September 17, 2009

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SURFACE TRANSPORTATION BOARD

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The Oklahoma Department of Transportation (“ODOT”) files this motion to supplement the record in this proceeding in response to the Reply filed by BNSF Railway Company (“BNSF”) on September 3, 2009 (“BNSF Reply”) which indicates that BNSF does not have sufficient information about the proposed agreement between ODOT and Montoff Transportation Company (“Montoff”).¹

Background

On August 31, 2009, Montoff, on behalf of itself and ODOT filed a joint Motion to Substitute Interim Trail Manager (“Motion to Substitute”) as provided for in 49 CFR 1152.29(f). The Motion to Substitute included all of the information required by the Board’s regulations. Montoff notified BNSF by email dated August 26, 2009, of its intention to file the Motion to Substitute, and served BNSF with a copy of the Motion to Substitute. A copy of the email notice is attached as Exhibit A. BNSF replied on September 3, 2009, by asking the Board to reject or

¹ The Board’s regulations generally do not provide for a reply to a reply. However, in this instance, BNSF has indicated that it requires additional information to evaluate the filing. To the extent that this motion would be considered a reply to a reply, ODOT requests that the Board accept the filing in order to have a complete record before it. *See, for example, The New York City Economic Development Corporation–Petition For Declaratory Order*, STB Finance Docket No. 34429, (served January 8, 2004).

deny the Motion to Substitute because it had “concerns” that it wanted addressed. *See* BNSF Reply at 3.²

Supplemental Information

ODOT hereby supplies the following information that BNSF says that it needs in order to determine whether it should oppose the Motion to Substitute:

(1) *BNSF transferred the property in question to ODOT for trail use and railbanking without any restriction on assignment.*

There is nothing in the Board’s regulation that requires the abandoning carrier to consent to the substitution of a trail user. In October 1998, BNSF agreed to transfer the property and track materials comprising the line of railroad between Fairmont and Guthrie. BNSF entered into an agreement with ODOT for that use, received a substantial sum of money for the Track Materials on the property, and donated the land to ODOT. *See* Interim Trail Use/Railbanking Agreement (without exhibits) attached hereto as Exhibit B (“Trail Use Agreement”). The transfer was made in accordance with the National Trails Systems Act, 16 USC 1247(d) (“Trails Act”) and the Board’s trail use regulations, 49 CFR 1152.29. The Trail Use Agreement does not contain any restriction on the assignment of the Agreement or its obligations by ODOT to a third party. Accordingly, ODOT was not required to obtain the consent of BNSF to the substitution of Montoff as the interim trail user.

ODOT thus proceeded to enter into a purchase agreement with Montoff under which Montoff would pay ODOT for the property and Track Materials. A copy of the Purchase

² ODOT is aware that Montoff’s email notice indicated that Montoff’s counsel would be out of the country until September 18, 2009, but ODOT is not clear why BNSF choose to file its reply so quickly instead of contacting ODOT and requesting the information that it said it is lacking.

Agreement³ is attached hereto as Exhibit C. Under the Purchase Agreement, the tracks on the right of way will not be salvaged; rather, Montoff intends to use the property initially for rail purposes, and ultimately as a line of railroad. See Purchase Agreement, paragraph 5(b); Montoff email. This is consistent with the terms and goals of the Trails Act which is to preserve as many rail corridors as possible for potential future use for rail purposes.

(2) *Montoff is a "qualified private organization."*

Neither the Trails Act, nor the Board's trail use regulations, define the term "qualified private organization." The Board has noted: "[W]e see no reason to change our longstanding practice of reading the word "qualified" in the statute to mean any private organization willing to assume responsibility for the line and agree to rail banking. ... Our Trails Act procedures have been in effect for more than 10 years. Yet no one has provided us with evidence suggesting any problem with trail sponsors failing to assume financial responsibility for the rights-of-way they manage under the Trails Act." *Idaho Northern & Pacific Railroad Company – Abandonment and Discontinuance Exemption – In Washington and Adams Counties, ID*, STB Docket No. AB-433 (Sub-No. 2X) (served March 2, 1998), 3 STB 50, 57 (citations omitted). While in the *Idaho Northern* decision the Board went on to defer to the railroad's decision to negotiate with a prospective trail user in the first instance, in this situation where BNSF has already sold the track materials and transferred the land to ODOT. It is ODOT that is currently responsible for management and maintenance of the right of way, and for liabilities with respect thereto. Thus, it is ODOT who is in the real party in interest and in the best position to determine if Montoff is qualified. ODOT is to be paid a substantial sum by Montoff and believes that Montoff has sufficient resources to pay the amount due and meet the ongoing obligations of a trail user.

³ The "Purchase Agreement" is comprised of two parts – an offer by Montoff that was accepted by ODOT, and an amendment agreed to by the parties (the "Purchase Amendment").

Additionally, the Trail Use Agreement, Section 11, contemplates that the property might be used by a party other than ODOT for trail or rail use. BNSF required that, in such event, ODOT require such user to provide specified amounts of insurance to cover the required indemnification exposure of BNSF. Montoff originally agreed to provide \$1,000,000 per incident and in the aggregate (Purchase Agreement, paragraph 7), but it also agreed to discharge all of the obligations of ODOT under the Trail Use Agreement. Purchase Agreement, paragraph 6. Montoff has since confirmed that it will provide insurance with limits of \$1,000,000 per incident and \$5,000,000 in the aggregate. See Montoff email. ODOT will require insurance in the higher limits as a condition of closing.

(3) *The arrangement between Montoff and ODOT preserves BNSF's contractual rights to repurchase the "Track Materials" as set forth in the Interim Trail Use Agreement.*

BNSF indicates that it is concerned about its reserved rights to acquire the Track Materials under certain circumstances, and whether those rights are being protected.⁴ As indicated in the email notice sent by Montoff to BNSF, all of BNSF's rights under the Trail Use Agreement are being protected, and Montoff is purchasing the property, including the Track Materials, subject to those rights. This is also clear in the Purchase Agreement Amendment, Section 1.01. Therefore BNSF should not have any concerns about the protection of its potential future rights with respect to the Track Materials.

⁴ ODOT disagrees with the intimation by BNSF that the proposed sale to Montoff triggers BNSF's reserved right to repurchase certain of the track materials. As noted above, the Trail Use Agreement contemplates that the property and track materials could be used for rail operations, and BNSF was only to have the right to repurchase the track materials if there were going to be salvaged or otherwise sold for removal from the property. As discussed above, there are no plans to salvage or remove any of the track materials that are on the right of way. Attempts by BNSF to remove the track materials would frustrate any chance that the property to be reactivated for rail service as part of the national network. In any event, this potential contractual dispute is subject to state contract law, and should not be determined by the Board. See CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (served April 24, 2008), *appeal docketed sub nom. Riffin v. STB*, No. 08-1208 (DC Cir. May 29, 2008) (“Any disputes relating to the validity of the purchase agreement or the transfer of the deed involve questions of state contract and property law. The Board is not the proper forum to resolve such disputes. Rather, these matters are best left for the state courts to decide.”).

Conclusion

Based on the supplemental information set forth herein, ODOT requests that the Board allow Montoff to become the substitute interim trail manager as requested in the Motion to Substitute.

Respectfully submitted,



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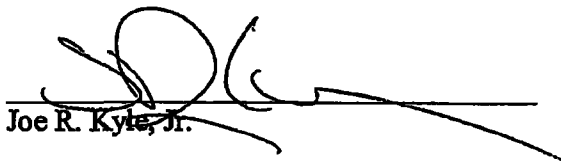
Attorneys for Oklahoma
Department of Transportation

Dated: September 17, 2009

VERIFICATION

I, Joe R. Kyle, Jr., Division Manager, Rail Programs Division, Oklahoma Department of Transportation, hereby verify under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on September 17, 2009.



Joe R. Kyle, Jr.

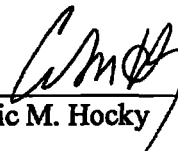
CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of September, a copy of the foregoing was sent to the following persons by US first class mail, postage prepaid, and by email:

Karl Morell
Of Counsel
Ball Janik LLP
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Washington, DC 20005
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Kristy Clark
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426 NS 162nd Street
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c.montange@verizon.net



Eric M. Hocky

EXHIBIT A

MONTOFF EMAIL

Charles Montange

From: "Charles Montange" <c.montange@verizon.net>
To: <Kristy.Clark@bnsf.com>; <Susan.Odom@bnsf.com>
Cc: "Bailiff, Sarah W" <Sarah.Bailiff@bnsf.com>
Sent: Wednesday, August 26, 2009 11:08 AM
Subject: Guthrie to Fairmont in Oklahoma

To: Ms. Odom and Ms. Clark, BNSF

Re: Guthrie to Fairmont line in OK

From: Chas. Montange, as Managing Member, Montoff Transportation Company

This is pursuant to my tel call this AM with Ms. Odom. I attempted also to call Ms. Clark in the law dept but she is on business travel, back Friday.

BNSF and the State of Oklahoma per its Transportation Dept. (ODOT) railbanked Guthrie to Fairmont (116.4 to 73.6) in Docket AB-6, Sub-no. 379X. ODOT took a deed and bill of sale, and ODOT and BNSF signed a railbanking agreement in 1998.

Montoff has negotiated a contract with ODOT to acquire the line, subject to STB authorization to become the substitute trail manager, and subject to all rights of BNSF under the various instruments between ODOT and BNSF. Basically, Montoff would step into ODOT's shoes. The railbanking agreement provides for insurance in the amount of \$ 1 million per occurrence, aggregate \$5 million, during any period of active interim trail use. Montoff would comply with this requirement.

Montoff understands that BNSF in relatively recent past has approached ODOT about possible use of the northern portion of this line for car storage. We are very interested in pursuing that opportunity and, as the economy improves, reactivation. However, for now, and in order to ensure that there are no title claims during car storage, it is obviously appropriate to maintain railbanking status, and that is our intent. We intend to approach BNSF to possibly lease or otherwise enter into an agreement to use portions of the line for storage. Under current STB construction of railbanking, BNSF is deemed to hold reactivation rights, and were we to seek to reactivate the line for common carrier freight, we would approach BNSF for a transfer of such rights. That does not appear necessary simply for car storage. I emphasize again that our interest is rail op. Although we (like ODOT) contemplate full compliance with the railbanking statute, we (like ODOT) have no plan to convert any of this into an active trail. In short, we seek cooperation with BNSF in exploring rail use of this line, initially at least for car storage, and in turn we cordially invite BNSF's support for our becoming "interim trail manager."

As I explained to Ms. Odom, I am leaving for a trip to former Yugoslavia on August 29. (My oldest daughter married a fellow from there, and we are planning to meet his family.) I will return on September 18, and be back in the office the following week. The contract with ODOT has just happened, and requires us to move promptly to become substitute trail manager. We are aiming for a closing on September 30. I would like to address any questions that BNSF has before I leave, and otherwise will be available during the week of September 21.

The attorney handling the matter at ODOT is Lou Persons II, tel: 405-521-2634.

I believe that Sarah Bailiff, then in the law dept., handled the legal side of the BNSF/ODOT relationship in the 90's, and probably has some institutional wisdom on dealings with ODOT.

8/26/2009

EXHIBIT B

TRAIL USE AGREEMENT

INTERIM TRAILS USE/RAILBANKING AGREEMENT

This Agreement is entered into between The Burlington Northern and Santa Fe Railway Company, a Delaware corporation with its principal place of business at 2650 Lou Menk Drive, Fort Worth, TX 76131-2830 ("BNSF" or "Grantor") and the State of Oklahoma, acting through the Oklahoma Department of Transportation ("ODOT" or "Grantee").

WHEREAS, pursuant to Agreement between Grantor and Grantee, and Section 1247(d) of the National Trails Systems Act, the parties seek to effect a donation of all of BNSF's right, title and interest in a rail corridor and trail-related structures (including land, bridges, culverts, and earthwork) situated between Fairmont and Guthrie in Garfield and Logan Counties, Oklahoma, from Milepost 73.60 to Milepost 116.40, a distance of approximately 42.80 miles, as more particularly described in the property description attached as Exhibit 1 to the Quit Claim Deed Exhibit A and the Bill of Sale Exhibit B attached hereto and made a part hereof ("the Premises"); and

WHEREAS, BNSF intends to sell to ODOT and ODOT intends to purchase the tracks, certain other improvements and personal property located on the Premises.

NOW THEREFORE, in consideration of the mutual covenants of the parties set forth herein, the parties agree as follows:

1. Description of Assets Transferred.

(a) Grantor shall donate and convey or cause to be conveyed at Closing, all of Grantor's right, title and interest, if any, in the Premises to Grantee by quitclaim deed (in the form attached hereto as Exhibit A) subject to all rights, easements and reservations in place or of record and in accordance with the other terms, conditions and reservations contained herein. All bridges, culverts and earthwork shall remain in place and become the property of Grantee upon conveyance of said Premises.

(b) Subject to BNSF's repurchase option set forth in this Agreement, Grantor shall sell and convey to Grantee at Closing pursuant to Bill of Sale in the form attached as Exhibit B, all of Grantor's right, title and interest, if any, in and to the track, improvements and personal property located on the Premises as of the effective date hereof, to wit: all rail, ties, spikes, tie plates, rail anchors, signaling and road crossing protection equipment, ballast, track materials and supplies (but excluding any vehicles, maintenance equipment on wheels, portable radios, or computer equipment,) whether such property is installed or uninstalled, and including all such property that constitutes improvements or appurtenances to the Premises ("Track Materials"). The conveyance of Track Materials shall be subject to the terms and conditions of this Agreement, the Bill of Sale, and any agreement assigned by Grantor hereunder.

(c) BNSF reserves a non-exclusive, permanent easement for construction, maintenance and operation of one or more fiber optic communication lines, together with related

facilities and appurtenances, in, under, across, along and through all or any portion of the Premises, on conditions that do not significantly increase the liability risk of any authorized user of the Premises.

(d) BNSF reserves ownership of hydrocarbon minerals rights as the term "hydrocarbon" is defined in the lease option agreement between The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Energy Company, dated September 30, 1987 (Lease Option Agreement), together with a right of entry onto the Premises for purposes of exploration and development of such hydrocarbons.

(e) BNSF's shall also retain a right of access at all times to exercise any rights related to retained interests in this Agreement.

(f) BNSF shall assign to Grantee, on the date of Closing, subject to all terms and conditions set forth in this Agreement, or in any agreement assigned by BNSF to Grantee in accordance with the terms of this Agreement, all assignable rights, interest, authorizations and agreements pertaining to the Premises, and all obligations of BNSF to the extent that they are related to the Premises and set forth in any agreement identified in Exhibit C attached hereto. Grantee hereby accepts the assignment of all such rights and obligations, effective on the date of Closing, in accordance with their terms and the terms hereof. BNSF reserves all rights set forth in any agreement that is not identified in Exhibit C and in any agreement identified in Exhibit C to the extent those rights are related to (i) BNSF's retained interests pursuant to this Agreement; or (ii) one or more other rail lines or property of BNSF not included in this transaction. In the event a contract is related to the Premises and inadvertently is not identified in Exhibit C and it is the intent of BNSF that such contract be assigned by BNSF, such contract shall be deemed assigned in whole or in part as appropriate, as of the date of Closing. BNSF shall not refund any prepaid or unearned lease, license, or permit fees or rentals.

2. Terms of Transfer.

(a) Grantee agrees to all of the following:

(1) Subject to the specific representations and warranties set forth in this Agreement and the Bill of Sale to accept the Premises and Track Materials "AS IS, WHERE IS" and "WITH ALL FAULTS."

(2) To pay to BNSF at Closing the total sum of \$2,600,000.00 in U.S. Dollars by check, wire transfer, or state warrant for the Track Materials.

(3) To cooperate with BNSF, with respect to any tax-deferred exchange or any other tax-related transaction pertaining to the transfer of the Premises or Track Materials (including, without limitation, any donation tax deductions) and to execute such documents as may be required to effect any permissible tax-deferred exchange or other tax-related transaction.

(4) To accept a donation of the Premises and take all actions and execute all documents, including but not limited to, the Donee Acknowledgment section of Internal Revenue Service Form 8283, which may be necessary to allow BNSF to take a tax deduction with regard to the donation described herein.

(5) To pay all costs of Closing (except BNSF's costs of preparation of documents to be delivered at Closing). This includes, but not limited to any transaction fees, transfer taxes, escrow and service fees, wire service fees, recording fees and sales taxes associated with this Agreement or any of the conveyances or assignments governed by this Agreement and except for any reasonable attorneys', accountants' and consultants' fees, costs and expenses related to any tax-deferred exchange.

(6) To pay and promptly arrange for any survey or plat required by any city, county, subdivision ordinance, or other governing authority. The survey or plat shall be submitted by Grantee to Grantor for review and approval prior to recording.

(b) Grantor agrees that prior to Closing, contingent upon authority of the Surface Transportation Board ("STB"), BNSF will discontinue service over the line and cancel applicable tariffs. In lieu of notice of consummation of abandonment, BNSF shall provide notice to the Board of consummation and implementation of this Agreement.

3. Government Approvals.

(a) This transfer shall be dependent upon and pursuant to the issuance of a Notice of Interim Trail Use ("NITU") in STB Docket No. AB-6 (Sub-No. 379X), *The Burlington Northern and Santa Fe Railway Company Abandonment in Garfield and Logan Counties, Oklahoma*, in accordance with 16 U.S.C. Section 1247(d), the STB's rules and regulations pertaining to interim trails use, and other applicable authorities. The terms hereof shall be governed by and in accordance with the issuance of a NITU in the referenced STB docket as requested by ODOT and acceded to by BNSF.

(b) In the event the STB or any other federal, state or local authority having jurisdiction over any part of this conveyance shall impose additional material terms or conditions upon this conveyance or revoke the authority to enter into such agreement, either party may terminate this agreement without liability to the other, except that Grantee shall reconvey the Premises to Grantor if a conveyance has already been effected. Grantee shall not be entitled to any reimbursement for payment of any fees or costs of the transaction, except repayment of the purchase price for Track Materials in the event they are reconveyed to Grantor.

4. Interim Trails Use.

(a) This Agreement and any conveyance pursuant to its terms shall be interpreted to conform to section 8(d) of the National Trails Systems Act, 16 U.S.C. Section 1247(d), and the rules and regulations of the Surface Transportation Board related thereto. Grantee shall assume all financial, managerial and legal responsibility and liability for use of said Premises in accordance

with the NITU, ODOT's Statement of Willingness to Assume Financial Responsibility filed with the STB, and any applicable STB orders related to this transaction. Grantee acknowledges that any interim trail use by Grantee or its assigns shall be subject to the possibility of future restoration of rail service necessity and/or Grantor's retained interests. Any future restoration of rail service on all or part of said Premises shall be pursuant to applicable federal and state laws. Grantee further agrees to take all steps necessary, at no expense to Grantor, to comply with any and all state and federal requirements relating to such interim trail use and/or restoration.

(b) In the event of restoration of rail service, Grantor shall not be liable for any penalties or direct, indirect, or consequential damages or costs or expenses arising out of such restoration.

(c) In no event shall this Agreement be construed to create a joint enterprise for the use or operation of the Premises.

5. Representation and Warranties

(a) BNSF hereby represents and warrants to ODOT, and ODOT's successors and assignees, the following facts, as of the date of this Agreement and as of the date of Closing:

- (1) BNSF is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware, and is qualified to do business as a foreign corporation in the State of Oklahoma;
- (2) BNSF has the corporate power and authority to enter into this Agreement, to make the donation described herein, and carry out its obligations under this Agreement; to the extent they are known by BNSF;
- (3) The execution, delivery and performance of this Agreement have been duly authorized and approved by all necessary corporate actions of BNSF, and no further corporate proceedings of BNSF are required to complete the transactions covered by this Agreement;
- (4) There is no provision in the Certificate of Incorporation or By-Laws of BNSF which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement.
- (5) All of BNSF's obligations set forth in this Agreement constitute legal, valid and binding obligations of BNSF which are enforceable against BNSF in accordance with their terms, except to the extent enforcement may be limited by bankruptcy, insolvency, reorganization, or other applicable law; and
- (6) BNSF is aware of a spill of several thousand gallons of diesel fuel on or near the Premises which occurred in February, 1993. The spill resulted from the collision of two trains at the interlocker at MP 73.60. The site was remediated with the

review and approval of officials from the State of Oklahoma. From a review of BNSF records where such information related to hazardous materials might reasonably be found, dating back to 1990, there is no record of any other unintentional releases of hazardous materials on the line. Subject to the foregoing disclosure, BNSF has not received any written notice of any pending or threatened civil, criminal, or administrative actions or any condition that may violate any environmental statute or regulation with respect to any hazardous or toxic substance on or adjacent to the Premises. As used in this subparagraph, "written notice" shall mean written notice delivered to, either BNSF's Assistant Vice President - Environmental and Hazardous Materials or BNSF's Director - Environmental Remediation and Special Projects.

- (7) No representation or warranty by BNSF in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to make any representation or warranty not materially misleading.

(b) ODOT hereby represents and warrants to BNSF, and BNSF's successors and assignees, the following facts, as of the date of this Agreement and as of the Date of Closing:

- (1) ODOT has all requisite authority to acquire BNSF's rights and properties which are conveyed to ODOT by this Agreement; to enter into this Agreement; and to perform all of ODOT's obligations under this Agreement to the extent they are known by ODOT; and
- (2) The execution of this Agreement and consummation of the transactions which are a part of this Agreement have been duly authorized and approved by all necessary actions by ODOT; and
- (3) No representation or warranty by ODOT in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to make any representation or warranty not materially misleading.

6. Tax Deferred Exchange

Grantor reserves the right to assign this Agreement to APEX Property & Track Exchange, Inc. ("Apex"). Apex is a qualified intermediary within the meaning of Section 1031 of the Internal Revenue Code of 1986, as amended, and Treas. Reg. Section 1.1031(k)-1(g), for the purpose of completing a tax-deferred exchange under said Section 1031. Grantor shall bear all expenses associated with the use of Apex, or necessary to qualify this transaction as a tax-deferred exchange. BNSF shall indemnify, defend and hold harmless ODOT fully against additional costs, expenses, and liabilities which ODOT may incur as a result of any tax-deferred exchange. BNSF's representations and warranties and the allocation of liabilities hereunder shall not be affected by any tax-deferred exchange, and ODOT shall not assume any liability or responsibility for any tax or other consequences to BNSF arising out of structuring this transaction as a tax-deferred exchange.

7. Successors in Interest and Survival of Rights and Obligations.

Wherever referred to herein, the term Grantee or ODOT shall imply, mean and apply to Grantee, its successors, assigns, heirs, executors, administrators, or designees, who shall be severally and collectively liable for any and all performance hereunder. Wherever referred to herein the term Grantor or BNSF shall imply, mean and apply to the Grantor, its successors, assign, heirs, executors, administrators, or designees, who shall be severally and collectively liable for any and all performance hereunder. All rights and obligations set forth herein shall survive Closing. The terms hereof shall be subject to amendment only by a written agreement signed by both parties or their respective successors or assigns.

8. Inspection of Premises.

(a) Promptly after the execution of this Agreement and up to the time of Closing, BNSF shall, upon reasonable notice and subject to Grantee's signing BNSF's standard Right of Entry Agreement, provide access to and cooperate with Grantee, its contractors, and its agents in the performance of a land survey or environmental investigations at Grantee's sole cost.

(b) Grantee acknowledges that it has inspected the Premises, including the bridges, culverts and earthwork and all Track Materials. Grantee acknowledges that no representation has been made by BNSF to Grantee or its contractors or agents concerning the state, condition or quality of the Premises and/or Track Materials, the title thereto, or age of any improvements thereon; provided, however, any representations and warranties set forth in the Bill of Sale shall apply with respect to the Track Materials.

(c) EXCEPT AS SET FORTH IN THE BILL OF SALE, BNSF HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE PREMISES IMPROVEMENTS OR TRACK MATERIALS, THEIR MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP, THE CONFORMITY OF THE PREMISES, TRACK MATERIALS OR IMPROVEMENTS FOR THEIR INTENDED USES, OR THE QUALITY OF TITLE TO THE PREMISES TRACK MATERIALS OR IMPROVEMENTS. BNSF SHALL NOT BE LIABLE TO GRANTEE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING STRICT LIABILITY IN TORT) WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE PREMISES TRACK MATERIALS OR IMPROVEMENTS TO THEIR INTENDED USES. GRANTEE ACCEPTS THE RAIL LINE IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON BNSF'S RIGHTS, TITLE, AND INTEREST IN AND TO THE PREMISES TRACK MATERIALS AND IMPROVEMENTS.

9. Qualified Donee.

Grantee represents and warrants to BNSF it is a political subdivision, validly existing and in good standing under applicable law and that Grantee is a qualified donee for purposes of a charitable contribution deduction under the U.S. Tax Code and rules and regulations thereunder.

10. Closing.

The obligation of Grantor to convey the Premises and to comply with all of the terms and conditions of this Agreement are subject to the prior satisfaction of the conditions set forth in this Agreement, unless waived in writing by both parties. After execution of this Agreement and satisfaction of all conditions herein, the parties shall arrange for Closing to occur the later of August 21, 1998, or ten (10) working days after the effective date of a Notice of Interim Trail Use issued by the STB. At Closing BNSF shall deliver to Grantee i) a sufficient number of original counterparts of an executed Quitclaim Deed to the Premises, in exact form as the Quitclaim Deed attached hereto as Exhibit A, to enable Grantee to file an original in each county in which the Premises are located; ii) an executed Bill of Sale transferring the bridges, culverts, earthwork, and Track Materials in the exact form attached hereto as Exhibit B; iii) all other documents and agreements required from BNSF under this Agreement. At Closing, Grantee shall pay to Grantor at Closing the sum agreed upon in Paragraph 2(a)(2) hereof.

11. Insurance During Active Interim Trail Use.

Grantee warrants to BNSF that Grantee shall require any trail user or rail operator other than Grantee, at its own expense, obtain and maintain in force an effect during any period of active interim trail use Commercial General Liability Insurance for all claims arising out of bodily injury, illness and death and from damages to or destruction of property of others, including loss of use thereof, and including liability of BNSF, with minimum limits for bodily injury and property damage of \$1,000,000.00 per occurrence, with an aggregate of \$5,000,000.00. In the event any trail user or rail operator other than Grantee is a political subdivision, a Certificate of Self Insurance up to said amounts for the same or similar coverage shall be sufficient. Evidence of insurance (or self insurance, as the case may be) shall be provided in advance of any such use.

12. Allocation of Liability; Indemnity.

- (a) Cooperation in Defense. ODOT and BNSF agree that, following the date of Closing, they will cooperate as necessary in defense of any claim, demand, investigation or litigation arising out of BNSF's or ODOT's ownership of, or activities on or near, the Premises or Track Materials.
- (b) Definition of Losses. In this Agreement, the term "Losses" shall include all costs, expenses, fees or liabilities of, or in any way related to: (i) any violation of law or regulation; (ii) any damage to property, the environment or natural resources; (iii) any bodily injury or death of any person; or (iv) the breach of any contract, including this Agreement to the extent set forth in this Agreement. "Losses" shall

include, but not be limited to, all costs of claims, activities in response to enforcement, costs of investigation and remediation, damages, judgments, awards, order, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees, and shall include cost recovery or contribution claims made pursuant to CERCLA or similar federal or state law.

(c) General Liability and Indemnity.

(1) BNSF's General Liability and Indemnity. Except as otherwise provided herein, to the extent permitted under Oklahoma law, BNSF shall be responsible for all Losses, which: (i) arise out of BNSF's ownership of, or activities on, the Premises or Track Materials on or prior to the date of Closing, or activities of BNSF or any lessee, licensee, permittee, invitee, contractor, representative or agent of BNSF, or any of their employees, related to BNSF's retained rights on the Premises or Track Materials after the date of Closing, except to the extent such Losses are proximately caused by ODOT's gross negligence or intentional misconduct in connection with ODOT's (or its lessees, licensees, permittees, invitees, contractors representatives or agents) activities on the Premises or Track Materials; or (ii) result from any breach by BNSF of any of its representations and warranties set forth herein, or any failure by BNSF to perform any of its obligations under this Agreement; or (iii) result from claims of third parties caused by BNSF's performance or nonperformance on or before the date of Closing under any contract, lease, permit, license, easement, or commitment related to the Premises that is being assigned to ODOT under this Agreement.

(2) ODOT's General Liability. Except as otherwise provided herein to the extent permitted under Oklahoma law, ODOT shall be responsible for all Losses which: (i) arise out of ODOT's ownership of, or activities on the Premises or Track Materials after 12:01 a.m. on the day following the date of Closing, except to the extent such Losses are proximately caused by BNSF's gross negligence or intentional misconduct in connection with BNSF's activities on the Premises or Track Materials after the date of Closing; (ii) result from any breach by ODOT of any of its representations or warranties set forth herein, or any failure by ODOT to perform any of its obligations under this Agreement; (iii) result from claims of third parties caused by ODOT's nonperformance or performance after Closing under any contract, lease, permit, license, easement or commitment relating to the Premises that is being assigned to ODOT under this Agreement; or (iv) result from the activities or presence on or near the Premises of ODOT or any of its employees, or the presence or activities on or near the Premises of any lessee, licensee, permittee, invitee, contractor, representative or agent of ODOT, or any of their employees, except to the extent proximately caused by BNSF's gross negligence or intentional misconduct.

(3) Notwithstanding any provision to the contrary, ODOT shall be responsible for the defense of any litigation contesting the right of the parties hereto to enter into or

effectuate this Agreement, excepting litigation brought by employees of BNSF. In the event ODOT does not actively defend against such claims on its own behalf and/or in joint defense with BNSF, ODOT agrees to reimburse BNSF for its attorneys' fees, costs, and judgments related to any such litigation arising out of the transfer or use of the Premises.

(d) Environmental Liability and Indemnity.

(1) ODOT's Inspection of the Premises. ODOT acknowledges that BNSF has provided ODOT with full access to inspect the Premises and Track Materials.

(2) BNSF's Environmental Liability and Indemnity. Notwithstanding any other liability or indemnification provision in this Agreement, BNSF shall be responsible for, and shall indemnify, defend and hold harmless ODOT (including its successors and assignees) fully against, Losses incurred due to any claim, demand or litigation, to the extent it is based on any violation or requirement of any applicable environmental statute, ordinance, rule, regulation, order or decision (collectively, "Environmental Law"), and the Losses arise from: (i) any chemical, material or substance that is now, or at the time in question is, regulated or governed by any law, the release of which creates any liability under any applicable law; or (ii) any other material which, when released, would cause significant ecological damage (items described by (i) or (ii) above are referenced hereinafter as "Hazardous Materials") located on, under or near the Premises, to the extent that such Losses:

(a) result from a violation of one or more Environmental Laws that existed on or prior to the date of Closing; and

(b) to the extent that the Loss results from a violation of one or more Environmental Laws that existed on or prior to the date of Closing, a written claim made by a party other than ODOT (whether presented to BNSF or ODOT) ("Claim") is delivered to BNSF within four years following the date of Closing.

(3) ODOT's Environmental Liability. Notwithstanding any other liability provision in this Agreement, to the extent permitted under Oklahoma statutes, ODOT shall be responsible for Losses incurred due to any claim, demand or litigation, to the extent it is based on any violation or requirement of any applicable Environmental Laws, and the Losses arise from any Hazardous Materials located on, under or near the Premises and to the extent such Losses are not otherwise the responsibility of BNSF as set forth in Paragraph 11(d)(2) of this Agreement.

(4) ODOT to Comply With Environmental Laws. After Closing, ODOT agrees to comply with all Environmental Laws concerning handling and disposal of Hazardous Materials in connection with ODOT's ownership of, and activities on, the Premises.

- (5) BNSF to Comply With Environmental Laws. After Closing, BNSF agrees to comply with all Environmental Laws concerning handling and disposal of Hazardous Materials in connection with BNSF's retained rights with respect to the Premises.
- (6) Liability Remedies and Obligations are Exclusive. ODOT and BNSF agree that the remedies and obligations set forth in this Paragraph 11 shall be exclusive remedies and obligations of each one to the other with respect to any Losses relating to the release or existence of Hazardous Materials on or near the Premises.
- (e) Indemnity Subject to Applicable Law. Nothing in this Paragraph 11 shall cause ODOT, the State of Oklahoma or BNSF to assume any liability that either ODOT, the State or BNSF is prohibited from assuming under Oklahoma law. The parties do agree to accept the liability obligations in this Agreement to the extent that they can do so consistent with Oklahoma law.

13. Liens and Encumbrances

BNSF represents, warrants and covenants that, to the best of BNSF's current knowledge without having done any search, BNSF has not caused or suffered, and will not cause or suffer prior to the date of Closing, any liens or encumbrances to secure the payment of a money to be filed against the Premises. BNSF will cause the release of any pre-Closing monetary lien against the Premises to be released or discharged within 30 days after receiving notice of such lien. ODOT agrees to take title to the Premises, interests and assets to be conveyed by the terms of this Agreement, subject to all non-monetary liens and encumbrances on the Premises, provided that ODOT does not hereby waive any claim of breach of any representation or warranty under this Agreement.

14. Repurchase Option on Track Materials.

(a) BNSF shall retain a right of first refusal to repurchase all or any portion of any Track Materials between MP 73.9 and MP 102.0 that ODOT or its successor(s) elects to salvage or offer for sale ("triggering event") prior to January 1, 2010. BNSF shall pay ODOT or its successor(s) the lower of

- (i) the Net Liquidated Value (NLV) at the time of intended liquidation; or
- (ii) the mileage-prorated percentage of the initial purchase price in Paragraph 2(a)(2) compounded by the annual change in the Producer's Price Index for the years between 1998 and the year of intended liquidation.

(b) In the event of a dispute over the calculation of either of these values, the parties shall submit the matter to neutral, binding arbitration pursuant to Paragraph 17 hereof.

(c) In addition, BNSF shall retain the right to match any legitimate arms length offer received for all or any portion of the Track Materials between MP 73.9 and MP 102.0 for salvage by ODOT between January 1, 2010 and January 1, 2015.

(d) In exercising its rights under this Section 14, BNSF shall be required to purchase all, and not less than all of the Track Materials being salvaged or offered for sale. Any salvage by BNSF pursuant to this Section 14 shall comply with the salvage conditions set forth in Section 17 of this Agreement.

(e) In exercising its rights under this Section 14, BNSF shall make its election in writing within 30 days of receipt of written notice from ODOT of a triggering event. Thereafter the parties agree to attempt in good faith to close the transaction within 60 days of BNSF's notice of election to exercise its repurchase rights.

15. Taxes.

BNSF shall be responsible for all real estate taxes applicable to the Premises on and prior to the date of Closing. No real estate taxes shall be applicable to the Premises following the date of Closing.

16. Real Estate Commissions.

If any real estate broker or agent can establish a valid claim for commission or other compensation as a result of Grantee having used their services in connection with the grant of the Premises, all such commission or other compensation shall be borne by Grantee. Neither Grantee nor Grantor shall not be liable for any real estate commissions or finders fees to any party with respect to the transfer of the Premises or Track Materials, as a result of the other party having used such services.

17. Salvage Conditions.

In the event salvage of Track Materials is conducted upon approval of governmental authorities and further subject to BNSF's repurchase option on Track Materials set forth in Paragraph 14, ODOT or its contractor, or in the event BNSF purchases the Track Materials, BNSF or its contractor shall ensure the following conditions are satisfied:

- (a) All necessary permits and licenses shall be obtained and complied with in all respects, including any and all federal, state, and local ordinances, laws, regulations, and STB orders applicable to salvage or Track Materials obtained pursuant to this Agreement.
- (b) All public or private highways, highway crossings, and highway approaches that may be affected by its operations hereunder shall be kept in an open and safe condition, unless permission to the contrary is given by proper public or private authority, as the case may be.

- (c) Whenever, upon proper authority having been obtained, highways, highway crossings, or highway approaches are temporarily closed, disturbed, or detours established, suitable barriers, warning signs, and lights for the protection of the public and interested owners of private property affected, shall be erected and maintained.
- (d) At the completion of work, public and private highways, highway crossings, and highway approaches that have been disturbed by salvage operations shall be restored by and to a condition satisfactory to any interested public authority.
- (e) ODOT IS PLACED ON NOTICE THAT FIBER OPTIC, COMMUNICATIONS, CONTROL SYSTEMS, AND OTHER TYPES OF CABLES MAY BE BURIED ON THE PROPERTIES. Before beginning work, ODOT shall telephone BNSF's Communications Network Control Center 1-800-533-2891 (a 24 hour number) to determine if cable systems are buried on the property. The Communication Network Control Center will contact the appropriate personnel to have cables located and make arrangements with ODOT for protective measures that must be adhered to prior to the commencement of any work on the property. In addition to the liability and indemnity terms elsewhere in this Agreement, ODOT shall require its contractor or the purchaser of the Track Materials (if other than BNSF) to indemnify and hold BNSF harmless against and from all costs, liability and expense whatsoever (including, without limitation, attorney's fees and court costs and expenses) arising out of or in any way contributed to by any act or omission of ODOT, its subcontractors, agents, and/or employees, that cause or in any way or decree contribute to (1) any damage to or destruction of any telecommunications system by ODOT, and/or its subcontractors, agents and/or employees, on the property (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on the properties, and/or (3) any claim or cause of action for alleged loss of profits or revenues by, or loss of service by a customer or user of, such telecommunication company(ies).

18. Governing Law and Dispute Resolution.

This agreement shall be governed by the laws of the State of Oklahoma and applicable federal laws pertaining to NITU's. In the event any dispute between Grantee and Grantor arises out of or relates to the construction of and/or performance under this Agreement, the allocation of liability between ODOT and BNSF pursuant to Paragraph 11 herein, or determination of the applicable repurchase price of Track Materials pursuant to Paragraph 13, the dispute shall be resolved by neutral binding arbitration panel of three disinterested arbitrators experienced in railroad commercial transactions pursuant to the Commercial Rules of Arbitration of the American Arbitration Association, as such rules may be amended from time to time.

19. Effect of Waiver.

Any waiver by either Grantor to Grantee or failure of either party to insist upon full and complete performance of its or the party's obligations set forth herein shall not constitute a waiver or release of such party's right to insist upon full and complete performance of any other obligations herein, or a waiver or release of such party's right to insist upon full and complete performance of the obligations that were waived or not enforced for periods prior to, or following, the waiver or failure to insist upon full and complete performance.

20. Notices.

All notices and other communications under this Agreement shall be in writing and deemed properly served if delivered by hand to the party addressed or, if mailed, when received by the United States Postal Service in registered or certified mail, postage prepaid, or, if sent by a national overnight service, when received by the carrier service in a prepaid mailer, return receipt required, addressed as follows:

BNSF: Vice President
Property Management Department
The Burlington Northern and Santa Fe Railway Company
P.O. Box 961050
2650 Lou Menk Drive
Fort Worth TX 76161-0050

ODOT: Joe R. Kyle, Jr., Manager
Office of Rail Programs
Oklahoma Department of Transportation
200 NE 21st Street
Oklahoma City, OK 73105

Either party hereto may change the address or addressee to which notices are to be given by providing written notice of the change to the other party without need of amendment to this Agreement.

21. Merger and Integration of Terms.

This Agreement together with all Exhibits attached hereto and by and between BNSF and ODOT, constitute the entire agreement between Grantor and Grantee relating to this transaction. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provisions in this Agreement are for convenience only, and shall not be deemed to modify or affect the rights or duties of the parties. All rights and obligations of the parties set forth herein or in the attachments hereto are integral parts of this Agreement. The consideration inducing the parties to enter into this Agreement includes all of the commitments and representations by

copy/within



Grantor to Grantee, and all of the commitments and representations by Grantee to Grantor, as set forth herein and in the Exhibits hereto.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have executed this Agreement in duplicate originals of equal force and effect as of the date last signed below.

**THE BURLINGTON NORTHERN AND SANTA
FE RAILWAY COMPANY, GRANTOR**

By: *Douglas J. Ball*
Name: Douglas J. Ball
Title: Senior Vice President - Merchandise
Date: 10/23/98

APPROVED AS TO FORM
Sarah Whitten Bickell
Burlington Northern Santa Fe Law Department

**STATE OF OKLAHOMA, acting through the
Oklahoma Department of Transportation, GRANTEE**

By: *Paul A. Adams*
Name: PAUL A. ADAMS
Title: DEPUTY DIRECTOR
Date: 10/19/98

Reviewed and Approved as to Form and Legality

By: *Louise Perone*
Name: Louise Perone
Title: Asst. Gen. Counsel
Date: 10/19/98


Grantor to Grantee, and all of the commitments and representations by Grantee to Grantor, as set forth herein and in the Exhibits hereto.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have executed this Agreement in duplicate originals of equal force and effect as of the date last signed below.

**THE BURLINGTON NORTHERN AND SANTA
FE RAILWAY COMPANY, GRANTOR**

By: _____
Name: _____
Title: _____
Date: _____

**STATE OF OKLAHOMA, acting through the
Oklahoma Department of Transportation, GRANTEE**

By: 
Name: PAUL A. ADAMS
Title: DEPUTY DIRECTOR
Date: 10/19/98

Reviewed and Approved as to Form and Legality

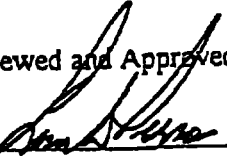
By: 
Name: Leonard D. Perrowe
Title: Asst Gen Counsel
Date: 10/19/98

EXHIBIT C

PURCHASE AGREEMENT

MONTOFF TRANSPORTATION COMPANY LLC

Att: C. Montange/Managing Member
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936

23 June 2009

OFFER TO PURCHASE

This OFFER TO PURCHASE, made this 23d day of June, 2009, by Montoff Transportation Company LLC ("Montoff"), to the STATE OF OKLAHOMA, acting by and through OKLAHOMA DEPARTMENT OF TRANSPORTATION ("ODOT"), relates to MP 73.60 (Fairmont) to MP 116.40 (Guthrie) in Garfield and Logan Counties, Oklahoma.

Montoff hereby offers to purchase, for the sum of two million six hundred thousand dollars (\$2,600,000) all the interests of ODOT (State), including in particular all interests ODOT acquired from the Burlington Northern and Santa Fe Railway ("BNSF") in the rail line at issue in STB Docket AB-6 (Sub-no. 379X) (MP 73.60 to MP 116.40, Fairmont to Guthrie in Garfield and Logan Counties, Oklahoma), subject to the following terms and conditions:

1. Montoff will send a bank check or wire transfer a deposit of \$100,000 within five days of written acceptance of this offer in accordance with written instructions received from ODOT. Said deposit will be held in escrow by ODOT or by a mutually agreeable escrow agent until closing (when it will be applied to the purchase price), forfeiture (if Montoff does not perform per the offer), or refund to Montoff (if the offer is accepted but closing does not occur due to the contingencies specified herein). This offer, upon acceptance and payment in escrow of the deposit shall be a contract between the parties, effective upon the date the deposit is paid or due, whichever event occurs first (this date shall be termed the "effective date").
2. If the contract becomes effective, Montoff will pay the balance due under this offer at closing.
3. Closing shall be at a mutually convenient time

and place thirty (30) days from the later of any of the following three events: (a) receipt of a report on environmental notices on the line per paragraph 4 below; and (b) any required authorization from the Surface Transportation Board ("STB") per paragraph 5(a) below. ODOT has represented to Montoff that it has not performed an environmental review prior to purchase, and was not informed by the prior owner (BNSF) of any environmental issues.

4. (a) Upon acceptance of this offer, Montoff shall immediately undertake, through third party consultants, environmental due diligence on the property, consisting as a minimum of a review of environmental notices relating to spills or underground tanks located on the property or on property immediately adjacent. If that review, which shall be completed within 30 days of the effective date or as soon thereafter as reasonably possible, identifies any environmental issue that Montoff in its discretion deems significant, Montoff immediately shall supply such information as it has obtained to ODOT and discuss the issue(s) with ODOT. If the parties have not resolved the issues within 60 days of the effective date, either party may terminate the agreement without penalty or liability to the other. Any termination shall be by written notice addressed in accordance with paragraph 17 below.

(b) As of the date of this offer, ODOT has indicated that the only information concerning possible spills or underground tanks in its possession in respect to the property in question is set forth in the historic and environmental reports served by BNSF upon ODOT in Docket AB-6 (Sub-no. 379X) on or about April 27, 1998. ODOT agrees to provide Montoff with any other information which a reasonable search may reveal in its possession concerning possible spills or underground tanks creating environmental problems or otherwise requiring remediation within 20 days of the effective date. If ODOT has no further information, ODOT will so state in writing within said 20 day period. Within 20 days of any disclosure of an environmental condition or requirement for remediation, Montoff may terminate this agreement if such conditions or requirements impose an undue burden, in Montoff's discretion.

(c) If the agreement is terminated by Montoff pursuant to 4(a) or 4(b), ODOT shall promptly return Montoff's deposit, and neither party shall

be liable to the other.

(d) Nothing in this paragraph 4 shall be construed to impose any duty upon ODOT or Montoff to remediate an environmental condition, or to assume responsibility for a condition, disclosed during environmental due diligence activities.

5. (a) Within ten business days of the acceptance of this offer by ODOT, Montoff, with the cooperation of ODOT, shall apply to STB to become substitute "interim trail manager" for the rail line. To this end, Montoff shall file a "statement of willingness" as required by 49 C.F.R. 1152.29. ODOT and Montoff recognize that STB in general seeks the consent of the abandoning railroad (here, BNSF) for substitution of interim trail managers. ODOT and Montoff shall cooperate in seeking BNSF consent. Montoff shall bear all filing fees required by STB for such a filing.

(b) Montoff represents that upon closing, it intends to make a good faith effort to persuade BNSF to enter into a car storage arrangement and subsequently to devote substantial overhead rail traffic (i.e., to restore freight rail service) to this line. Montoff further represents that in the event of restoration of freight service, Montoff has arrangements (currently with Mr. Mark Vaughn) for institution of rail excursion service. In the event appropriate arrangements are made with BNSF, Montoff will need (a) to acquire the right to reactivate freight rail service by filing a notice of exemption pursuant to 49 C.F.R. 1150.21, et seq., and (b) in the event of actual reactivation, to dismiss the Notice of Interim Trail Use applicable for the rail line. Montoff shall bear all filing fees and costs associated with such proceedings. ODOT will cooperate in, and not oppose, such filings.

(c) In the event that STB fails to allow Montoff to become the substitute trail manager within 90 days of filing of a proceeding for same with STB, either party may terminate this agreement. In this event, ODOT shall take all steps necessary to ensure that the deposit is promptly returned to Montoff and neither party shall be liable to the other.

6. The property shall be conveyed in, AS IS, WHERE IS condition, without warranties of usability for any particular use or of title, by mutually agreeable quitclaim deed pursuant to 16 U.S.C. 1247(d), subject to all licenses, easements, and

other agreements of record, including the provisions of the railbanking agreement between BNSF and ODOT dated October 19, 1998, by ODOT. Montoff shall be responsible to discharge all obligations of ODOT to BNSF under that railbanking agreement arising after the date of closing. Montoff shall employ the property only for lawful purposes and shall be responsible to comply with all applicable local, state, and federal requirements, including all applicable rail safety requirements in the event of rail reactivation.

7. Upon closing, Montoff shall be responsible for all taxes, managerial costs, and tort liability in connection with the property and arising after closing. On or before closing, Montoff shall secure general liability insurance for the property in an amount no less than \$1 million per incident and aggregate. Either or both BNSF and ODOT shall be added as co-insured, with 30 day notice of termination, if they so request in writing.

8. Taxes, if any, shall be prorated at the time of closing. The parties shall split any escrow agent costs.

9. This agreement shall be construed in accordance with the laws of Oklahoma.

10. Nothing herein shall commit ODOT or the State of Oklahoma to entertain, to make, or to provide any subsidy to Montoff or its assign or its contract rail operator for railroad rehabilitation, maintenance or operation; provided, however, that upon request by Montoff, ODOT will encourage BNSF to devote overhead freight rail traffic to the line.

11. Time is of the essence.

12. This offer when accepted shall be the contract between the parties. Once accepted by ODOT, it may not be amended except by another writing signed by both parties. Unless amended in writing and only to the extent it is amended in writing, signed by both parties, this offer once accepted shall be and is the entire agreement between the parties.

13. Montoff reserves the right to withdraw this offer if not accepted within fifteen business days

of receipt.

14. Within ten days of acceptance of this offer, ODOT shall supply Montoff with copies of all track charts, bridge inspection reports, valuation section maps, underlying deeds, and records of easements, licenses, leases, or other interests pertaining to the property, including but not limited to any sales or transfers by ODOT. Montoff may terminate this agreement within twenty days of receipt of the records above should Montoff determine in its absolute discretion that any grants of interests to, or claims by, third parties materially and adversely affect Montoff's business plans. At closing, ODOT's position in all such easements, licenses, leases, or other interests shall be assigned to Montoff.

15. In accepting this offer, ODOT represents that it has not caused any liens or encumbrances to arise in respect to this property.

16. Upon closing, Montoff shall be responsible for all claims for property damage or personal injury or environmental conditions which arise from events after the date of closing. ODOT shall be responsible for all claims for property damage or personal injury or environmental conditions which arise from events before the date of closing. Nothing herein shall operate to remove liability from third parties for property damage or personal injury or environmental conditions.

17. All notices and communications required to be in writing shall be deemed valid and delivered on the date sent (if electronically dispatched by fax or email in accordance with the instruction below) or on the next business day if sent by express (next business day) delivery and addressed in accordance with the instruction below:

- if to ODOT, to Manager, Office of Rail Programs, Oklahoma Department of Transportation, 200 NE 21st St., Oklahoma City, OK 73105, fax: ; email:

- if to Montoff, to Charles H. Montange, Managing Member, Montoff Transportation Co., 426 NW 162d St., Seattle, WA 98177, fax: 206-546-3739; email: c.montange@verizon.net

18. Facsimile execution and delivery of this offer and any acceptance shall be deemed as valid as exchange of original signed copies of the offer and any acceptance.

19. Montoff and ODOT respectively represent to the other that the signators below are duly authorized to bind their respective entities.

20. Montoff represents that if this Offer is accepted, it intends to organize a limited liability corporation with identical ownership to that of Montoff and to assign all rights and responsibilities of this offer, if accepted, to that entity. In accepting this offer, ODOT expressly agrees to that assignment.

21. Obligations to be performed after closing shall be deemed to survive closing.

Montoff Transportation Company
LLC

By: 

Charles H. Montange
Managing Member
Date: 23 Jun 09

The foregoing offer is hereby accepted.

State of Oklahoma by and
through Oklahoma
Department of Transportation

By: 

Name: DAVID STREEB
Title: DIRECTOR OF ENGINEERING
Date: 8/19/09

Reviewed and approved for ODOT as
to form and legality:

By: 

Name: David Streeb

Title: Asst Gen Counsel

Date: 08/19/09

First Amendment to "Existing Contract"

This First Amendment to "Existing Contract" amends the "Offer to Purchase" dated 23 June 2009 by Montoff Transportation Company LLC ("Montoff") accepted by Oklahoma Department of Transportation ("STATE") on August 19, 2009 (the "Offer to Purchase" as accepted is herein referred to as the "Existing Contract").

Recitals:

A. STATE acquired a line of railroad between Guthrie (Milepost 116.40) and Fairmont (Milepost 73.60) in the State of Oklahoma from Burlington Northern and Santa Fe Railway ("BNSF"), milepost and has contracted to sell same to Montoff. Said acquisition and sale are pursuant to and consistent with, among other things, the Railroad Revitalization Act.

B. Montoff desires to acquire and make its best commercially reasonable efforts to operate said line for rail purposes, and otherwise to act consistently with the federal regulatory status of the line.

C. Montoff is acquiring said line as is, where is, without warranties of usability for any particular purpose from STATE, and with knowledge that certain bridges may need removal and ultimate replacement, or repair, that switches must be restored at either end for freight interconnection, that certain agreements may be necessary with BNSF for freight service restoration, and that certain approvals may be required from federal regulatory agencies for common carrier freight service restoration.

STATE and Montoff agree to modify and to amend their Existing Contract as follows:

Section One: Properties and Purchase

1.01 - STATE shall convey the line of railroad described as Milepost 73.60 at Fairmont, Oklahoma, to Milepost 116.40 at Guthrie, Oklahoma, together with all improvements, including track, ties, roadbed, other track material, and bridges ("Conveyed Properties") by quitclaim deed and bill of sale in the forms attached as Exhibit I at closing. The property to be conveyed shall include all property conveyed by BNSF to STATE under the bill of sale dated October 30, 1998, and donative quitclaim deed of the same date, and shall not include properties excluded from same. The conveyance shall be subject to all rights retained by BNSF in said instruments. Upon Closing, it is the intent of the parties that Montoff shall have all rights currently held by STATE, if any, to reactivate rail service on the Conveyed Properties, and to collect all revenue of any sort from any use of the Conveyed Properties.

1.02 - STATE advises Montoff that STATE wishes to construct a new four-lane bridge over Cotton Creek adjacent to the existing

historical structure. In order to facilitate this reconstruction, the parties agree as follows: (a) notwithstanding the Existing Contract or paragraph 1.01 above, STATE may reserve from any conveyance to Montoff at Closing a strip of land measured perpendicular to the existing highway bridge structure and approaches thereto at Cotton Creek and extending five hundred (500) feet to either side of the centerline of the bridge structure. In constructing a new four-lane bridge, STATE will take due care not to interfere with clearance requirements for railroad operations. STATE will retain all rail materials removed during the course of bridge construction. STATE advises that it expects to complete bridge construction by the end of 2012. STATE will advise Montoff or its assignee in writing within 30 days of bridge completion. Montoff or its assignee shall have 60 days from receipt of said notice to acquire all property which would have been conveyed to Montoff at Closing but for this paragraph, upon the payment of \$10. In the event Montoff exercises this option, STATE shall restore all roadbed, rail, and ties removed for, or damaged by, said bridge construction, or, at State's election, pay Montoff for the costs of Montoff's restoring said rail.

1.03 - In the event Montoff (or any assign or successor in interest) makes application for abandonment authority to the Surface Transportation Board ("STB") for any portion of this line within three years of the date of Closing, STATE shall have the following right, subject to any orders of the STB (including orders in "offer of financial assistance" proceedings associated with said application for abandonment authority), and subject to any rights of BNSF to reacquire the property as set forth in its agreements with STATE: provided STATE notifies Montoff within thirty (30) days of the effective date of said abandonment authority, STATE shall have the right to reacquire said property at a price determined in accordance with STB methodology in "offer of financial assistance" proceedings. The parties agree that under said methodology, the price will be established as net liquidation value of the track, ties, and other track materials plus the across-the-fence appraised value of all real estate parcels in the right of way to which Montoff (or its assign or successor) holds marketable title. If Montoff has executed a binding contract for sale or donation of all or a portion of the property at issue, that price shall govern. In the absence of an executed binding contract, an appraisal process using the above methodology may be necessary to determine all or a portion of value. The parties shall select one or more independent appraisers for this purpose within 30 days following STATE's notice. In the absence of agreement, the parties shall select a person recommended by the General Counsel of the Association of American Railroads in Washington, D.C. STATE and Montoff shall cooperate in facilitating an expeditious appraisal process once an appraiser is selected. Upon issuance of the appraisal, STATE shall notify Montoff within ten (10) business days whether it intends to go forward with the purchase of all property at the

contract price and/or the appraised price. Closing shall be within the following 50 days. STATE shall have the option of seeking renewed railbanking authority for said property in the event of reacquisition, provided however that Montoff will cooperate in said process. The parties shall share the cost of the appraisal on a 50/50 basis if STATE reacquires as provided above. If the STATE does not reacquire as provided above, STATE shall bear all appraisal costs. The property will be conveyed in as is, where is condition, by quitclaim deed and bill of sale.

1.04 - In addition to the quitclaim deed and bill of sale which STATE will provide Montoff at Closing, STATE shall provide all other documents necessary to reflect the vesting of STATE's right, title, and interest in the Conveyed Properties to Montoff at Closing. STATE will also provide, and Montoff will accept, an assignment of all existing agreements, license, or easements pertaining to use of said Conveyed Properties. STATE agrees to make such agreements, licenses, or easements available to Montoff for inspection on or before September 22, 2009.

Section II - Compliance with Law

2.01 - Montoff shall be responsible at its own cost for complying with any STB requirements for transfer of railbanked property and for reactivation of common carrier freight rail services, provided, however, that Montoff and STATE agree that at no time during Montoff's ownership shall STATE be considered a common carrier railroad in connection with the Conveyed Properties. Montoff agrees that it will make clear in an appropriate fashion in any pleadings filed with STB that STATE shall not be so considered, and that relief should not be granted Montoff if under that relief STATE would be considered a common carrier railroad. Consistent with the above, STATE agrees to cooperate with, and be supportive of, Montoff's requests to STB for the purpose of implementing the Existing Contract and this First Amendment. Montoff will serve copies of Montoff's pleadings upon STATE in any proceedings before STB relating to the conveyed premises, or will notify STATE that a pleading is being filed, contemporaneous with said filing, in the event copies will be available for download from the STB website.

2.02 - Montoff agrees to comply with all applicable law, including all applicable federal rail regulatory requirements, and will not knowingly do, or permit to be done, upon or about the Conveyed Property anything forbidden by an applicable statute, regulation or ordinance.

Section III - Inspection

3.01 - Montoff and its representatives shall have a right of entry for inspection prior to closing, provided that any person entering the property on behalf of Montoff shall first furnish STATE a signed instrument acceptable to STATE releasing the STATE from any claim for property damage or personal injury sustained

by that person on the property, and holding the STATE harmless from any claim of property damage or personal injury incurred by a third person arising from said entry. No firearms shall be used on the property during entry. No materials shall be taken from the property or deposited on the property during entry. Private property rights shall be respected during entry.

3.02 - Prior to closing, Montoff shall provide a writing indicating it has inspected the Conveyed Properties and accepts same in as is, where is condition. Montoff acknowledges that STATE shall not be responsible for maintenance and rehabilitation costs for rail purposes.

Section IV - Representations and Warranties

4.01 - State represents and warrants that

(a) it has full statutory power and authority to enter into this Existing Contract and First Amendment and to carry out the obligations of the State hereunder. STATE shall not be prevented from fulfilling its obligations under this Agreement as a result of legislative or judicial action, or a written opinion of STATE's Attorney General;

(b) its execution of and performance under this Existing Contract and First Amendment do not violate any statute, rule, regulation, order, writ, injunction or decree of any court, administrative agency or governmental body.

4.02 - Montoff represents and warrants that

(a) it is duly organized, validly existing, and in good standing under the laws of the State of Delaware, and that it is qualified to do business in the State of Oklahoma;

(b) it has full power and authority to enter into this Existing Contract and First Amendment and, subject to necessary judicial and regulatory authority, to carry out its obligations hereunder.

Section V - Liability

5.01 - Effective at the later of closing or the date on which STB authorizes Montoff to assume responsibilities as interim trail manager, Montoff shall assume full responsibility for management of, and for legal liability arising out of the transfer or use of the Conveyed Property, and for payment of any taxes that may be levied or assessed against the Conveyed Property. This responsibility shall include all responsibility arising under 16 U.S.C. 1247(d) and 49 C.F.R. 1152.29.

5.02 - Montoff shall hold harmless and indemnify STATE, its officers, agents, servants and employees, against any liability, loss, claims or expenses for damage to property, including property of or under control of Montoff or STATE, or for personal injury or death, if such property damage or personal injury shall arise out of any act or omission of Montoff in the performance of its rights, responsibilities, and duties under this Agreement. To the extent provided by law, STATE shall hold harmless and

indemnify Montoff, its officers, agents, servants and employees, against any liability, loss, claims or expenses for damage to property of third parties, or for personal injury or death, that arose in connection with the Conveyed Property prior to Closing. Neither party indemnifies the other party in the event that the other party's gross negligence contributed to the liability, loss, claim or expense.

5.03- This First Amendment is intended to relate solely to the relationship between Montoff and STATE. Nothing herein shall be construed to create any liability on the part of Montoff or the STATE to a third party, or any obligation by Montoff or the STATE to a third party.

5.04 - Effective at Closing, Montoff shall secure and maintain in effect at all times until sale of the Conveyed Property a contractual liability insurance policy in which the STATE is a third party insured providing coverage from liability for damage to property and for personal injury or death pursuant to this Section. At the request of the STATE, Montoff shall provide a certificate of insurance showing such coverage at Closing.

5.05 -- Upon Closing, Montoff will be responsible for all taxes hereinafter lawfully assessed upon Montoff's interests in or on the Conveyed Property.

Section VI - Mediation and Conciliation.

6.01 - In the event of a dispute or difference of agreement in connection with this First Amendment, either party may request mediation. If the other party agrees, the parties shall jointly select a mediator within ten days, dividing the costs of the mediator evenly, with each party otherwise bearing its own expenses. Mediation may be terminated at the written request of either party.

Section VII - Miscellaneous

7.01 - In accordance with the Existing Contract, the Existing Contract as modified by this First Amendment states the entire agreement between the parties and may only be amended by a writing duly executed by both parties.

7.02 - STATE hereby changes the party to whom notice shall be sent to Oklahoma Department of Transportation, Attn: Director, 200 N.E. 21st Street, Oklahoma City, OK 73105-3204.

7.03 - The Managing Member executing this First Amendment on behalf of Montoff warrants, attests and affirms that he is fully aware of the facts and circumstances surrounding the making of this First Amendment, and has been personally and directly involved in the proceedings leading to the negotiation and execution of the Existing Contract and this First Amendment, and to the best of his knowledge, information and belief neither Montoff nor anyone representing Montoff has paid, given, donated, or agreed to pay, give or donate any money or anything of value,

either directly or indirectly, to any officer or employee of the State of Oklahoma in order to obtain the Existing Contract or the First Amendment thereto.

7.04 - This First Amendment may be executed in separate counterparts, and shall be deemed effective upon delivery of the final signature by fax transmission, express delivery service, or USPS with delivery confirmation service.

Section VIII - Closinc

8.01 - Closing for the sale shall be conducted in the offices of Mr. Joe Kyle, Oklahoma Department of Transportation, on Thursday, September 30, 2009, or as soon thereafter as all necessary preconditions (e.g., STB transfer of interim trail manager status and completion of environmental reviews) are met. STATE shall supply duly executed instruments of transfer suitable for recording at Closing. Montoff shall supply a cashier's check or other acceptable negotiable instrument in the amount of two million five hundred thousand dollars (\$2,500,000), the amount due after application of the one hundred thousand dollar deposit already paid (receipt of such deposit by the STATE is hereby acknowledged).

So agreed:

MONTOFF TRANSPORTATION COMPANY LLC

Charles H. Mortange, Managing Member

STATE of OKLAHOMA, acting through its
administrative agency, OKLAHOMA DEPARTMENT
of TRANSPORTATION

Director

Approved as to form:

General Counsel